Supreme Court, U.S.
FILED
OCT 28 1997
CLERK

(3)

No. 96-2045

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

REINERT & DUREE, P.C., GARY ROBBINS, ROBBINS & ASSOCIATES, INC., ESTES & ESTES, INC. AND JAMES C. LANDES,

Petitioners,

v.

DAVID A. SOSNE, BANKRUPTCY TRUSTEE FOR JUST BRAKES CORPORATE SYSTEMS, INC., DEBTOR,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eight Circuit

RESPONDENT'S BRIEF IN OPPOSITION

Steven M. Hamburg
Summers, Compton, Wells & Hamburg
8909 Ladue Road
St. Louis, MO 63124
(314) 991-4999
ATTORNEY FOR RESPONDENT

8pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

STATEMENT OF THE CASE 1

SUMMARY OF THE ARGUMENT 1

ARGUMENT 2

CONCLUSION 5

TABLE OF AUTHORITIES

Cases Cited ***Page***

In re Advanced Ribbons & Office Prods., Inc.,
125 B.R. 259 (B.A.P. 9th Cir. 1991) 5

In re Alcom Corp.,
154 B.R. 97 (Bankr. D.D.C. 1993) 5

Celotex Corp., v. Edwards,
514 U.S. 300, 131 L.Ed. 2nd. 403,
115 S.Ct. 1493(1995).....1, 3, 5

Edwards v. Armstrong World Industries, Inc.,
6 F.3rd. 312 (5th Cir. 1993).....1, 3

Statues Cited
11 U.S.C. §105.....3
11 U.S.C. §362.....1, 2, 3, 4

STATEMENT OF THE CASE

This petition is one of two petitions seeking a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit. The Respondent has heretofore filed its Petition for Writ of Certiorari (hereinafter referred to as "Respondent's Petition") in the proceeding styled *David A. Sosne, Trustee v. Reinert & Duree, P.C., et al.*, which has been assigned Cause No. 97-7 by this Court. The Respondent's Petition contains a concise statement of the case, setting forth the facts material to the consideration of the questions presented by the Eighth Circuit decision. To avoid repetition, this Court is respectfully referred to the Respondent's Petition filed in said related proceeding, and the Respondent will confine this brief to the separate questions raised by the Petitioners in this proceeding.

SUMMARY OF THE ARGUMENT

Contrary to the argument of the Petitioners, the decision below does not establish a rule "...that all parties are automatically barred from dealing in property in which neither the debtor nor the bankruptcy estate holds an interest..." Rather, the Eighth Circuit held that proceeding with a foreclosure action against the Debtor after the filing of a bankruptcy petition was a violation of the automatic stay provisions of 11 U.S.C §362. The decision of the Eighth Circuit for which the Petitioners seek a Writ of Certiorari is not in conflict with Celotex Corp. v. Edwards, 514 U.S. 300, 131 L. Ed. 2nd. 403, 115 S.Ct. 1493 (1995) and Edwards v. Armstrong World Industries, Inc., 6 Fd. 3rd. 312 (5th Cir. 1993).

ARGUMENT

The Petitioners have submitted to this Court that their collection activities were not against the Debtor because the Debtor, allegedly, did not have an interest in the property the Petitioners levied upon and caused to be sold. The facts of the case clearly reflect otherwise and the issue of whether or not the Debtor had an interest in the property levied upon is irrelevant since the Petitioners continued with an action against the Debtor which was based solely upon a claim against the Debtor, conduct directly proscribed by 11 U.S.C. §362(a).

The Petitioners obtained a judgment against the Debtor in state court. The Petitioners also obtained an order from the state court barring the Debtor from transferring the asset upon which the Petitioners sought to levy. After the Debtor filed its Chapter 7 bankruptcy proceeding, the Petitioners continued with their collection activities and orchestrated the state court sale of the asset in question. The Debtor was a party to the state court ordered sale and the Debtor's interest in the asset in question was sold as part of that sale. The Petitioners argue that at the time of the filing of the bankruptcy proceeding the only asset of the Debtor's estate was a claim to avoid the sale of the trademark. Petitioners ignore that it was continuing an action against the Debtor by proceeding with the sheriff's sale and obtaining the proceeds.

Even if the Debtor did not have any interest in the asset sold, it is clear that the Debtor was a party to the State Court proceeding and that the Petitioners were attempting to collect a judgment against the Debtor. The Petitioners' argument is based entirely upon the false premise that its collection activities were not against the Debtor since,

allegedly, the Debtor had no interest in the property being sold. The Petitioners argued to the Eighth Circuit that they did not violate the automatic stay when they collected the sale proceeds because the Debtor did not have an interest in the assets sold. The Eighth Circuit held that the nature of the Debtor's interest in the property was irrelevant because, by continuing with the sale against the Debtor to collect their judgment against the Debtor, the Petitioners were acting to collect, assess or recover a claim against the Debtor in violation of the automatic stay provisions of §362(a)(6).

The Petitioners argue that the decision of the Eighth Circuit is in conflict with the case of Celotex Corp. v. Bennie Edwards, 514 U.S. 300, 131 L. Ed. 2nd 403, 115 S. Ct. 1493 (1995) and Edwards v. Armstrong World Industries, Inc., 6 Fd. 3rd 312 (5th Cir. 1993). The Respondent submits that these cases do not conflict with the decision of the Eighth Circuit rendered herein.

In Celotex v. Edwards the claimant sought to execute against a surety of Celotex (not directly against the debtor as in this proceeding) on a supersedeas bond. The supersedeas bond had been posted prior to the bankruptcy proceeding. The Court held that Celotex did not have a property interest in the bond at the time of the bankruptcy and therefore the provisions of 11 U.S.C. §362 did not prevent the claimant from executing against the surety. The question which was the focus of the Celotex v. Edwards case was whether the Bankruptcy Court had the authority to enjoin the claimant from executing on the supersedeas bond under 11 U.S.C. §105 when Celotex no longer had a property interest in the bond.

The Petitioners' argument has a fundamental flaw. It ignores the fact that its foreclosure action was against the

Debtor, not against a third party, such as the surety in Celotex. Regardless of the Debtor's interest in the property in question, the Petitioners proceeded with their execution against the Debtor. This act violates the plain language of §362(a)(6) which provides:

> [A] petition filed under...this title...operates as a stay... of (6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title.

The Petitioners' execution against the Debtor also violates §362(a)(1) which provides:

> [A] petition filed under...this title...operates as a stay... of (1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title.

The Eighth Circuit held that the actions of the Petitioners were clearly to collect on their judgment against the Debtor. The Eighth Circuit distinguished this case from the cases holding that §362(a)(6) does not automatically stay post-petition acts to collect creditors' independent claims against the debtors' guarantors. The distinguishing factor is that §362(a)(6) does not automatically stay post-petition acts to collect creditors' independent claims against debtors'

guarantors. See In re Alcom Corp., 154 B.R. 97, 115-116 (Bankr. D.D.C. 1993); In re Advanced Ribbons & Office Prods., Inc., 125 B.R. 259, 265 (B.A.P. 9th Cir. 1991). In the case at hand, the Petitioners did not have a separate and independent claim against a third party surety. The Petitioners' only claim was directly against the Debtor. Therefore, there is no conflict between the Celotex line of cases and the decision of the Eighth Circuit in this matter.

CONCLUSION

Contrary to the argument of the Petitioners, the decision of the Eighth Circuit for which the Petitioners seek a Writ of Certiorari does not establish the rule "...that all parties are automatically barred from dealing in property in which neither the debtor nor the bankruptcy estate holds an interest..." Contrary to the argument of the Petitioners, the decision of the Eighth Circuit does not conflict with Celotex v. Edwards.

WHEREFORE, the Respondent respectfully requests that this Court deny the Petitioners' Petition for a Writ of Certiorari.

Dated: 7/25/97

Steven M. Hamburg
Summers, Compton, Wells & Hamburg, P.C.
8909 Ladue Road
St. Louis, MO 63124
(314) 991-4999
Counsel for Respondent